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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1964

No. 979

DYKE WATER COMPANY, a California corporation, and WILLIAM M. LANSDALE, president, and ARLYNE LANSDALE, secretary-treasurer, officers, directors and stockholders of said Dyke Water Company, and DYKE LANSDALE,

Petitioners,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, and FREDERICK B. HOLOBOFF, GEORGE G. GROVER, EVERETT C. McKEAGE, PETER E. MITCHELL and WILLIAM M. BENNETT, members of and constituting said Public Utilities Commission of the State of California,

Respondents.

PETITION FOR A WRIT OF CERTIORARI to the Supreme Court of the State of California

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Petitioners,

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PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, and FREDERICK B. HOLOBOFF, GEORGE G. GROVER, EVERETT C. McKEAGE, PETER E. MITCHELL and WILLIAM M. BENNETT, members of and constituting said Public Utilities Commission of the State of California,

Respondents.

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to the Supreme Court of the
State of California

To the Honorable Earl Warren, Chief Justice of the Supreme Court of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Petitioners pray that a Writ of Certiorari be issued to review the judgments of the Supreme Court of the State of California in the above entitled case issued on November 19, 1964, and December 17, 1964.

OPINIONS BELOW

The only opinion delivered in the proceedings below is that of the Public Utilities Commission of the State of California, entered July 10, 1964, in Decision No. 67497 (Exhibit No. 1, Appendix, infra, page 1a). This opinion is reported in 63 Cal. PUC 76.

JURISDICTION

The action of the Supreme Court of the State of California was entered November 19, 1964. Jurisdiction of the Supreme Court of the United States to review this cause on Petition for Writ of Certiorari rests on the provisions of 28 U.S.C. Section 1257 (3).

Petitioners have exhausted all provisions of review and all rights of relief under the laws of the State of California, and rules and regulations thereunder.

STATEMENT OF THE CASE

Petitioners Arlyne Lansdale is the mother of Petitioners William M. and Dyke Lansdale. Petitioner Dyke Water Company is a public utility water service corporation organized in 1952 by Petitioner Arlyne Lansdale and her husband, L. D. Lansdale, now deceased, and Petitioners William M. and Dyke Lansdale, for the distribution of water to residents in Orange County, California, with its principal place of business in Garden Grove, Orange County, California.

In proceedings before the Public Utilities Commission of California, Petitioner Dyke Water Company, its president, Petitioner William M. Lansdale; its secretary-treasurer, Petitioner Arlyne Lansdale, and Petitioner Dyke Lansdale, who is not an officer, director or stockholder of Petitioner Dyke Water Company, were charged with wilful violation of orders of the said Commission in six separate "offenses".

These proceedings were:

(1) Instituted by the Public Utilities Commission;

(2) Prosecuted by the Commission, and

(3) Heard by a single Commission member.

After the denial of Petitioners' request for review by the Commission as a whole of the rulings of the single presiding Commissioner and denial of Petitioners' request for presentation of oral arguments before the Commission en banc, the Commission, by a *three* to *two* vote, upon the report and recommendation of the single Commissioner who presided, adjudged Petitioners guilty of the contempt charged and

imposed the jail sentences of five days each on two of the "six offenses" charged on each of the individuals and fines totaling $12,000.00.

The order of the Public Utilities Commission of the State of California finding Petitioners guilty of contempt and imposing jail sentence and fine, issued July 10, 1964, in Decision No. 67497, supra, is set forth as Exhibit No. 1, Appendix, infra, page 1a.

The order of the Public Utilities Commission of the State of California denying the Petition for Rehearing, issued August 25, 1964, in Decision No. 67778 is set forth as Exhibit No. 2. Appendix, infra, page 59a.

No intermediate court review of decisions of the Public Utilities Commission is provided under the law of the State of California. Exclusive and limited jurisdiction to review such decisions is vested solely in the Supreme Court of the State of California (Sec. 1759, *Public Utilities Act*).

On September 23, 1964, Petitioners filed in the Supreme Court of the State of California case S.F. 21828, their Petition for Writ of Certiorari, or review, which petition was denied by said Court by order filed November 19, 1964, *supra,* with *Justices Mosk and Schauer stating they would have granted the petition for review.* Petitioners' Petition for Rehearing was denied by said Court by order filed December 17, 1964.

The judgment of the Supreme Court of California in denying the Petition for Writ of Review, issued November 19, 1964, in case S.F. 21828, is set forth as Exhibit 3, Appendix, infra, page 62a.

The judgment of the Supreme Court of California denying the Petition for Rehearing, issued December 17, 1964, in case S.F. 21828 is set forth as Exhibit No. 4, Appendix, infra, page 63a.

Petitioners' claim that the opinion and order of the Commission in Decision No. 67497, *supra,* imposing jail sentences on the individual petitioners and fines totaling $12,000.00 on all Petitioners violated rights guaranteed Petitioners under the Constitution of the United States and the Fifth and Fourteenth Amendments thereto was raised forthwith upon issuance of said Decision No. 67497, *supra,* by way of a Petition for Rehearing filed before the Commission (p. 2, *Petition for Rehearing, Exhibit 2, Record of Case*), and in Petition for Writ of Review to the Supreme Court of California (pp. 2, 3, 6) in *Record of Case* and in Petition for Rehearing to the Supreme Court of California (p. 2 and pp. 8, 9 Appendix) in *Record of Case.*

This claim was based on decisions of the United States Supreme Court handed down in the weeks immediately preceding establishing that the provisions of the 14th Amendment extend the guarantees of the first eight Amendments of the United States Constitution to State proceedings as well as to Federal action.

On December 21, 1964, Petitioners filed with the Supreme Court of the State of California, in case S.F. 21828, *supra,* their Petition for an Order Staying the Effect of the Opinion and Order of the Public Utilities Commission of California in Decision No. 67497,

supra, and for Temporary Stay thereof, pending the preparation and filing of this Application for Writ of Certiorari in the Supreme Court of the United States. Said petition for stay was denied by the Supreme Court in an order filed December 23, 1964, which judgment is set forth as Exhibit No. 5, Appendix, infra, page 64a.

On December 30, 1964, Petitioners filed in the Supreme Court of the United States their Application for a Stay of the Effect of the Orders of the Public Utilities Commission of the State of California in Decision No. 67497, *supra,* pending the filing of a Petition for Writ of Certiorari in this Court, and the disposition of said Petition by said Court. On December 31, 1964, the Honorable William O. Douglas, Associate Justice of the Supreme Court of the United States, signed an order granting said stay "pending the timely filing and disposition of a Petition for Writ of Certiorari to review the action of the Supreme Court of California of November 19, 1964 (rehearing denied December 19, 1964)."

QUESTION PRESENTED FOR REVIEW

Does the judgment of the Supreme Court of California denying Petitioners' Petition for a Writ of Review of the Decision of the Public Utilities Commission of California sentencing the individual petitioners to jail terms and imposing fines on all petitioners deprive said Petitioners of their personal liberty and property in violation of rights guaranteed

to Petitioners under the Constitution of the United States of America?

CONSTITUTIONAL PROVISIONS, STATUTES INVOLVED

The relevant section of 28 USC 1257 reads as follows:

> "Final judgments or decrees rendered by the highest court of the State in which a decision could be had, may be reviewed by the Supreme Court as follows: . . . (3) By Writ of Certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specifically set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

The relevant section of Article IV of the Constitution of the United States reads as follows:

> "Sec. 2 (cl.1) The Citizens of each State shall be entitled to all privileges and immunities of Citizens of the several states."

The relevant section of Article VI of the Constitution of the United States reads as follows:

> "(cl.2) This Constitution, and the Laws of the United States shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in

the Constitution or Laws of any State to the contrary notwithstanding."

The relevant section of the Fifth Amendment to the Constitution of the United States reads as follows:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."

The relevant section of the Fourteenth Amendment to the Constitution of the United States reads as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the law."

The relevant section of the Constitution of the State of California reads as follows:

> "Article XII § 22 . . . and the commission and each of the commissioners shall have the power to administer oaths, take testimony and punish for contempt in the same manner and to the same extent as courts of record; . . ."

The relevant sections of the Public Utilities Act of the State of California read as follows:

> "§ 312. Issuance and Service or Process: Fees. The commission and each commissioner may issue

writs of summons, subpenas, warrants of attachment, warrants of commitment, and all necessary process in proceedings for contempt, in like manner and to the same extent as courts of record . . ."

"§ 2113. Punishment of Utilities, etc., for Contempt: Remedy in Addition to Others Prescribed. Every public utility, corporation, or person which fails to comply with any part of any order, decision, rule, regulation, direction, demand, or requirement of the commission or any commissioner is in contempt of the Commission, and is punishable by the commission for contempt in the same manner and to the same extent as contempt is punished by courts of record . . ."

"§ 1757. No new or additional evidence may be introduced in the Supreme Court, but the cause shall be heard on the record of the Commission as certified by it. The review shall not be extended further than to determine whether the commission has regularly pursued its authority, including a determination of whether the order or decision under review violates any right of the petitioner under the Constitution of the United States or of this State. The findings and conclusions of the commission on questions of fact shall be final and shall not be subject to review except as provided in this article. Such questions of fact shall include ultimate facts and the findings and conclusions of the Commission on reasonableness and discrimination."

"§ 1759. Jurisdiction of Courts to Review Orders or Decisions of Commission. No court of this State, except the Supreme Court to the extent specified in this article, shall have jurisdiction to

review, reverse, correct, or annul any order or decision of the commission or to suspend or delay the execution or operation thereof, or to enjoin, restrain, or interfere with the commission in the performance of its official duties, except that the writ of mandamus shall lie from the Supreme Court to the Commission in all proper cases."

REASONS FOR GRANTING WRIT

Unless the Writ of Certiorari is granted by this Court, Petitioners, and each of them, will be subjected to punishment by fines of $3,000.00 each (totaling $12,000.00) and individual petitioners William M. Lansdale, Arlyne Lansdale and Dyke Lansdale will be subjected to further punishment by loss of personal liberty by imprisonment in the County Jail in Orange County, California, in violation of their rights under the Constitution of the United States to a trial before a competent judicial tribunal on charges punishable by fines and imprisonment.

ARGUMENT

The judgment of the Supreme Court of California denying the Petition for Writ of Review of the decision of the Public Utilities Commission of California violated Petitioners' constitutional right to a trial before a competent judicial tribunal on charges punishable by fine and imprisonment.

The California commission's authority to punish for contempt is based upon the provision of the Cali-

fornia Constitution that the administrative agency shall have the "*power to punish for contempt in the same manner and to the same extent as courts of record*" (*Cal. Const.* Art. XII, Sec. 22) (Emphasis added).

The effect of this provision is to give to the Commission its own process for enforcing orders in a proceeding that is similar to and independent of court enforcement.

The constitutional provisions are implemented by the Public Utilities Act and the Code of Civil Procedure which give the Commission the power to punish by fine and imprisonment (*Public Utilities Act,* Secs. 312 and 2113; and *Code of Civil Procedure,* Sec. 1218).

Although the Public Utilities Commission of the State of California has been vested with some judicial powers, the Supreme Court of California has expressly recognized that it is not a judicial tribunal.

In *People v. Western Air Lines, Inc.* (1954), 42 C. 2d 621, 268 P. 2d 723, the Supreme Court of California states:

> ". . . The commission is not a judicial tribunal constitutionally established as a part of the judicial department of the state. (7) It is also observed that the commission is in the position of acting at times as informer, prosecutor, jury and judge in matters coming before it. It takes place, for example, when the commission on its own motion issues an order directing some person, firm, or corporation within its regulatory jurisdiction to show cause why it should not be required to perform or not perform a certain

designated act or be subject to discipline for performing an act contrary to law or public utility regulation. (8) The proceedings may take on the character of an adversary proceeding in which the commission furnishes evidence, judicially passes upon the competence and weight of that evidence and makes an order based upon it. This kind of establishment was seriously criticized in its early stages by those affected by it. (9) But it is the law that when the system has been duly authorized by the Constitution of the state and the procedure is such as to satisfy the requirements of due process, both state and federal, no valid objection can be made to it. Due process as to the commission's initial action is provided by the requirement of adequate notice to a party affected and an opportunity to be heard before a valid order can be made. (See *Southern Pac. Co. v. Public Utilities Com.* (1953), 41 Cal. 2d 354, 365, 260 P. 2d 70). (11) When the commission has acted and an interested party is dissatisfied due process is further afforded by the right of petition for writ of review to this court. (12) And of course no law of this state could deprive a party whose rights were prejudicially affected of the right to apply to the Supreme Court of the United States for relief on federal constitutional grounds.

"So, while it is true that the commission is not a judicial tribunal in a strict sense, it does not follow that it does not possess well established and well understood judicial power."

It is the very vesting of the power in the Commission to act as "informer, prosecutor, jury and judge

in matters coming before it" and the absence of any requirement of judicial qualification for its members that distinguishes the Commission from a court in the exercise of the functions which are the subject of the guarantees to the Citizens of the United States under the Fourth and Sixth Articles of, and the Fifth and Fourteenth Amendments to, the Constitution of the United States.

Petitioners' position is that the rule enunciated by the first Justice Harlan in the famous *Brimson* case, in 1894 (*Interstate Commerce Commission v. Brimson,* 154 U.S. 447, 488, 489) that "such a body could not, under our system of government, and consistently with due process of law, be invested with authority to compel obedience to its orders by judgment of fine or imprisonment" extends to the powers of the Public Utilities Commission of California under the 14th Amendment and that the exercise of such powers by such agency violate Petitioners' constitutional rights.

Justice Harlan struck at the very basis of the power now claimed. That case dealt with a statute which permitted the Interstate Commerce Commission to apply to a United States Circuit Court for enforcement of subpoenas issued by the agency. It was argued that the statute was invalid because it violated the separation of powers doctrine, and because it failed to present the court with an actual case of controversy as required by the Constitution. While proceeding to hold the statute constitutional, the Court stated:

> "Of course, the question of punishing the defendants for contempt could not arise before the commission; for, in a judicial sense, there is no such thing as contempt of a subordinate administrative body. No question of contempt could arise until the issue of law . . . is determined adversely to the defendants and they refuse to obey, not the order of the commission but the final order of the court."

Justice Harlan, however, added the emphatic declaration that:

> "Such a body (as the ICC) could not, under our system of government, and consistently with due process of law, be invested with authority to compel obedience to its orders by a judgment of fine or imprisonment. . . . The power to impose fine or imprisonment in order to compel the performance of a legal duty imposed by the United States can only be exerted under the law of the land by a competent judicial tribunal having jurisdiction in the premises." (*Ibid.* at 485.)

This declaration that due process is *per se* violated by permitting anyone but the courts to deprive an individual of his liberty or property had been previously held in a number of decisions of state courts under the due process of law provisions of the constitutions. *Whitcombs* case, 120 Mass. 118 (1876); *Langenberg v. Decker,* 131 Ind. 471, 31 N.E. 190 (1892).

In the *Langenberg* decision, the reasons compelling this conclusion are forcefully set forth:

"A citizen can only be imprisoned by due process of law. . . . If the (Agency) had jurisdiction to adjudge that the appellee should be imprisoned there was due process of law; if it had no jurisdiction to imprison, there was not due process of law and the appellee was unlawfully deprived of his liberty.

"In free countries courts always have assumed jurisdiction of questions involving personal liberty, and so they must, or else free government, securing personal liberty, ceases to exist. When that great right comes in issue, the courts hear and decide, and the authority of the executive or administrative officers is at end. Whatever else such officers may be empowered to do, they cannot be empowered to sit in judgment upon the right of a citizen to his personal liberty. Only the courts can give the command which takes from the citizen his liberty and places him within prison walls, and they can only give it in accordance with the law of the land. However extensive the authority of the board may be, it is always ministerial or administrative, and hence does not go far enough to adjudge imprisonment, for it is beyond the power of the legislature to invest it or any administrative board with that high judicial function." (*Ibid.* 31 N.E., 195.)

The force of the logic of this reasoning is just as compelling today. As stated by one leading author in this field:

"It is the absence of administrative powers of imprisonment that sharply distinguishes a legal system like the Anglo-American from those which prevail in those countries we disparagingly de-

scribe as totalitarian." (Schwartz, *Introduction to American Administrative Law,* 101.)

In a series of recent decisions of far reaching effect, the Supreme Court of the United States has expressly extended the provisions of the 14th Amendment to the first eight Amendments of the Constitution of the United States.

In doing this, the Court has expressly over-ruled earlier decisions holding that rights guaranteed under the first eight Amendments were not protected against State action by the 14th Amendment.

Malloy v. Hogan (1964), 378 U.S. 1, 12 L. ed 2d 653;

Aguilar v. Texas (1964), 378 U.S. 108, 12 L. ed 2d 732;

Escobeda v. Illinois (1964), 378 U.S. 411, 12 L. ed 2d 977;

W. Murphy and J. Moody Sr. v. Waterfront Commission of N. Y. Harbor (1964), 378 U.S. 52;

Reynolds v. Sims (1964), 377 U.S. 633;

Lucas v. 44th General Assembly of State of Colorado (1964), 377 U.S. 713.

And, as stated in *Gomillion v. Lightfoot*, 364 U.S. 339, 347, the responsibility of this Court to its Citizens is not left to question:

> "When a State exercises power within the domain of State interest, it is insulated from federal judicial review. But such insulation is not carried over when State power is used as an instrument for circumventing a federally protected right."

The fundamental premise expounded in these recent decisions is that the rights guaranteed to the Citizens under the Bill of Rights apply as stringently to State proceedings as they do to federal proceedings. The contention that the 14th Amendment applies to the States only a "watered down subjective version of the Bill of Rights" has been expressly rejected. (*Malloy v. Hogan, supra.*)

The Supreme Court's declaration in the *Brimson* case, that the exercise of contempt powers by other than a court violated the basic principles of due process guaranteed to every citizen under the Fifth Amendment stands today unchallenged. The recent decisions of the Supreme Court which have been reviewed remove any doubt that the Fourteenth Amendment extends the protection of the first eight Amendments to the citizens in state proceedings as well as federal proceedings. Any suggestion that the rights herein involved are less important or less basic to the preservation of the freedom of the individual than those which have been expressly confirmed by the Supreme Court in the recent decisions, must be rejected.

The authorities heretofore considered have been careful to point out that the rights here involved are basic to our free society and distinguish the free countries from the totalitarian states. The bulwark of our freedom is that the courts have always assumed jurisdiction of questions involving personal liberties, "and so they must or else free government,

securing personal liberty, ceases to exist." (*Langenberg v. Decker, supra*).

Any holding that a state agency can "under our system of government, and consistently with due process of law, be invested with authority to compel obedience to its orders by a judgment of fine or imprisonment" is no less repugnant to our system of government than a holding that a federal agency be invested with such power. The same reasons that compelled the conclusion in the *Brimson* case that the power to impose fine or imprisonment under our system of government can be exercised only by the courts of competent jurisdiction in federal proceedings apply equally to state proceedings.

The attempt to invest contempt authority in an agency which occupies the multiple role of investigator, arresting officer, prosecutor, judge, jury and jailor, with power to cite and punish with fines and imprisonment, cuts across and runs counter to the guarantees of the Bill of Rights which are basic to our free society.

CONCLUSION

It is respectfully submitted that the judgment of the Supreme Court of the State of California of November 19, 1964, in denying the Petition for Writ of Review of Decision No. 67497 of the Public Utilities Commission of California in a contempt proceeding criminal in nature by a quasi-judicial administrative agency is in violation of rights guaranteed to Petitioners under the Constitution of the United States. The Petition for Writ of Certiorari should be granted.

Dated, Sacramento, California,
March 8, 1965.

Respectfully submitted,
ALVIN LANDIS,
Counsel for Petitioner.

THOMAS W. MARTIN,
Of Counsel.

Affidavit of William M. Lansdale

State of California
County of Orange—ss

I, William M. Lansdale, being first duly sworn, deposes, and says:

That I, William M. Lansdale, am President of the Dyke Water Company, a California corporation, and am authorized to make this verification for and on behalf of said corporation and individual petitioners in this action.

That I have read the foregoing Petition to the Supreme Court of the United States for Writ of Certiorari to review the action of the Supreme Court of California of November 19, 1964, in denying review of the opinion and order of the Public Utilities Commission of California in Decision No. 67497 and know the contents thereof; that the same is true of my own knowledge, except as to those matters which are therein stated on my information or belief, and as to those matters I believe it to be true.

William M. Lansdale.

Subscribed and sworn to before me this 1st day of March, 1965.

(Seal)

Doris I. Trossen,
Notary Public in and for the County of Orange, State of California.
My Commission Expires May 8, 1968.

(Appendix—Exhibits 1 to 5 Follow)

Appendix

EXHIBIT NO. 1

Before the Public Utilities Commission
of the State of California

Decision No. 67497

In the Matter of Application of Dyke Water Company, a corporation, for authorization to increase its rates charged for water service.	Application No. 39303
Investigation on the Commission's own motion into the rates, rules, regulations, contracts, operations and practices pertaining to and involving water main extensions of Dyke Water Company, a public utility water corporation.	Case No. 5841 Order to Show Cause (Contempt)

J. Thomason Phelps, for Rolla J. Weiser, affiant.

Lally & Martin, by *Thomas W. Martin*, for Dyke Water Company, William M. Lansdale, Arlyne Lansdale and Dyke Lansdale, respondents.

OPINION

Dyke Water Company, a public utility corporation and William M. Lansdale, Arlyne Lansdale and Dyke Lansdale, its officers and directors, were ordered to

show cause why they should not be adjudged in contempt of the Public Utilities Commission and punished therefor according to law.[1]

The order to show cause, issued November 28, 1962, recites the filing of an affidavit of Rolla J. Weiser, in which respondents are charged, in six separate offenses, with having contumaciously failed and refused to comply with certain orders of the Commission.

Certified copies of the affidavit and order to show cause were personally served on all respondents prior to the hearings, which were held, after due notice, at Los Angeles and San Francisco on 15 days during the period commencing January 9, 1963 and ending October 11, 1963, before Commissioner Grover and Examiner Gregory. All respondents were represented by counsel. Arlyne Lansdale, the company's Secretary-Treasurer and Attorney, and William M. Lansdale, her son and the President of the company, both testified voluntarily.

Respondents, at the hearing on February 14, 1963, orally moved to dismiss the case. The motion, submitted on written memoranda later filed by the parties, was denied with leave to respondents to file a pleading responsive to the order to show cause. On April 1, 1963 respondents filed a written answer to the Weiser affidavit, admitting certain allegations and denying others, thereby raising issues that will be described later. Thereafter, the presiding commissioner directed

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[1]Calif. Const., Art. XII, Sec. 22; Public Util. Code, Secs. 312 and 2113.

affiant to go forward with evidence. Affiant testified in support of his affidavit, the affidavit was offered and received in evidence and affiant then rested. Respondents then moved that the proceeding be dismissed for failure of affiant to produce any evidence except the affidavit. The motion was denied. Respondents then went forward with evidence.

Seven witnesses, including Arlyne Lansdale and William M. Lansdale, testified during the 15 days of hearings, and 54 exhibits were received. Numerous objections to the receipt of evidence were made. A considerable amount of testimony was allowed over objection by affiant's counsel, with leave granted to move to strike such evidence at a later time. Such a motion was duly presented in a communication to the Commission after the hearings were concluded. This motion was denied by the presiding commissioner by an order contained in a letter of November 12, 1963 addressed to counsel for affiant and respondents.

Respondents, at the close of the hearings and later in a communication addressed to the Commission after the hearings pursuant to leave granted, renewed their motion to dismiss the order to show cause, the affidavit and the contempt proceedings. This motion was denied by the presiding commissioner at the close of the hearings and again in said letter of November 12, 1963. The contempt proceedings were taken under submission, subject to the filing of concurrent opening and closing briefs, by an order issued by the Commission on November 12, 1963. Closing briefs were filed on January 24, 1964.

The Issues.

The affidavit alleges six separate offenses by respondents arising out of certain orders issued by the Commission in the basic proceeding herein. That proceeding involved an application by Dyke Water Company to increase its rates for water service on its system in Orange County (Application No. 39303) and an investigation on the Commission's own motion into various matters pertaining to water main extensions by the utility (Case No. 5841, consolidated for hearing with Application No. 39303).

The orders, as pertinent here, in substance directed the utility:

1. To adjust its books of account to conform to a certain balance sheet prepared by the Commission staff. (Decision No. 59828, ordering paragraph 3, issued March 22, 1960; effective July 25, 1961, after review by California Supreme Court, *Dyke Water Co. v. P.U.C.*, 56 Cal.2d 105; cert. den. 368 U.S. 939, 9 L.ed. 2d 338; Ex. B to affiant's affidavit.)

2. To institute immediately a metering program and install not less than 400 meters per month in addition to metering all new service connections until all residential and other general service connections had been metered. (Decision No. 59828, supra, ordering paragraph 4b.)

3. To report to the Commission, within 90 days after the effective date of the order, and every 180 days thereafter, the total number of

meters installed, together with the net number of meters installed during the period covered in each such report until all of its service connections had been metered. (Decision No. 59828, supra, ordering paragraph 4c.)

4. To dispose of certain recorded contributions pursuant to certain recommendations of the Commission staff. (Decision No. 59828, supra, ordering paragraph 6a.)

5. To set up forthwith and maintain a special reserve account and bank account and to credit thereto from time to time amounts representing the difference between revenues accruing under an interim rate authorized by the Commission and those that would have accrued under prior rates. (Order of May 16, 1960, effective during period from May 16, 1960 through August 1, 1961; Ex. G to affiant's affidavit.)

6. To formulate and advise the Commission within ten days of a plan for refunding moneys received representing the difference between revenues accruing under said interim rate order and those that would have accrued under prior rates. (Order of July 25, 1961, effective immediately; Ex. H to affiant's affidavit.)

The affidavit for an order to show cause, in specifying with particularity each of the six offenses, contains appropriate allegations concerning respondents' knowledge of the Commission's orders, their intent to violate them and their ability to comply with them.

None of the orders has been amended, revoked, or annulled and each is still in full force and effect.

Respondents' answer contains, in substance, the following admissions, denials and affirmative allegations pertaining to the foregoing alleged offenses:

First Offense: Respondents deny that Dyke Water Company did not adjust its books of account.

Second Offense: Respondents admit that Dyke Water Company did not institute a metering program, but deny that failure so to do was willful, and allege that it was a financial and physical impossibility to comply with said order.

Third Offense: Respondents admit that Dyke Water Company did not report to the Commission with respect to the installation of meters, but deny that failure so to do was willful, and allege that respondents were unable to comply with said order to report upon the installation of meters.

Fourth Offense: Respondents admit that Dyke Water Company did not dispose of all recorded contributions in aid of construction, but deny that failure so to do was willful, and allege that respondents were unable to comply with the order to dispose of said contributions and that to do so would seriously jeopardize the utility's operations.

Fifth Offense: Respondents admit that Dyke Water Company did not set up and maintain a special reserve account and cause to be credited

to said account revenues as required by the Commission's order, but deny that failure so to do was willful, and allege that respondents were unable to comply with said order.

Sixth Offense: Respondents admit that Dyke Water Company did not formulate and advise the Commission of a plan to refund money to consumers as required by the order of the Commission, but deny that failure so to do was willful, and allege that respondents were unable to comply with said order.

Included in affiant's listing of the issues are the following (Opening Br. pp. 6-8):

I. Whether respondents adjusted the books of Dyke Water as required by the Commission's order.

II. Whether respondents were physically unable to institute a metering program and install not less than 400 meters per month.

III. Whether respondents were financially unable to institute a metering program and install not less than 400 meters per month.

IV. Whether respondents were unable to report periodically to the Commission in writing with respect to the installation of meters.

V. Whether respondents were unable to dispose of the contributions in aid of construction described in the affidavit.

VI. Whether compliance with the Commission's order to dispose of said contributions

would seriously jeopardize the operations of Dyke Water Company.

VII. Whether respondents were unable to comply with the Commission's order requiring Dyke Water Company to set up and maintain a special reserve account and bank account and to credit thereto certain amounts of money from time to time.

VIII. Whether respondents were unable to comply with the Commission's order requiring Dyke Water Company to formulate and advise the Commission of a plan to refund certain moneys to consumers.

The affidavit alleged, with respect to each offense, that respondents' failure to comply with a Commission order was "with intent to violate the same." Respondents' answer, except as to the First Offense, denied that failure to comply was willful. Respondents' denial of "willfulness" in connection with certain of the offenses raises additional issues as to whether the alleged failure to comply with the Commission's orders was intentional.[2]

It was stipulated at the hearing that the whole of the record in the basic proceeding, comprising the pleadings, 67 exhibits and 23 volumes of transcript,

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[2]As to the First Offense, respondents simply denied failure to adjust their books of account, thereby raising an issue of fact. If this issue be resolved against respondents, willfulness can be inferred from the fact of noncompliance. (*Vernon v. Superior Court*, 38 Cal.2d 509, 518.) This would likewise be true of respondents' denial of willfulness as to the Third Offense (failure to report periodically on meter installations), since compliance in either case would involve mere clerical acts.

be considered as a part of the present record, as well as the 54 exhibits (Exs. C-1 through C-54) and 15 volumes of transcript, designated as "Order to Show Cause (Contempt)," in the contempt proceeding.

We now turn to the evidence related to the several offenses alleged in the affidavit.

First Offense

The Commission's order requiring an adjustment of the books of Dyke Water Company, the major item of which was the requirement to remove from the assets of the company nearly $500,000 representing alleged contributions to the company by the Lansdale family, became effective, after review, on July 25, 1961. The record shows that as late as March 20, 1962 such an adjustment had not been made on the company's books of account.

Respondents urge that the correctness of the ordered adjustments is questionable and that, in any event, timely adjustments were made, after March 20, 1962, by journal entries which would normally be posted to the books and records prior to their closing for the year 1961 and were included in the company's 1961 and 1962 annual reports filed with the Commission.

The Commission's order did not specify a time by which the required adjustments were to be made; in effect, therefore, the order directed them to be made within a reasonable time. The order became effective July 25, 1961, following review by the California Supreme Court.

We do not agree with respondents that adjusting the books at some undisclosed time after March 20, 1962 would be within a reasonable time after July 25, 1961. The intervening period of almost eight months involved an unreasonable delay in complying with a mere clerical directive. Mrs. Lansdale testified that she instructed the company's accounts to make the adjustments. She did not establish, however, when she gave them that instruction nor when, if ever, they carried it out. Although she categorically stated that the adjustments were made, it is apparent from her testimony as a whole that she really did not know whether or not the accountants had made the necessary entries; her position amounted to no more than a claim that they must have done so because they would have no reason to disobey her directive.

The annual reports for 1961 and 1962, relied on by respondents as showing the adjustments, were not filed until August 1, 1963 and September 13, 1963, respectively; in the case of the 1961 annual report, the filing was made 16 months late and only after a special directive of the Commission. (Decision No. 65665, dated July 9, 1963, in Cases Nos. 7518 and 7519.) These annual reports are not in this record in their entirety, and respondents have not shown how any part of them demonstrates that adjustments on the company's *books* were made—nor when.

Second Offense

The Commission's order requiring installation of meters became effective, after review, on July 25, 1961.

Respondents have admitted that they did not comply, but allege that compliance was "a financial and physical impossibility."

The evidence shows that it would be physically possible to do the job, with labor in addition to the utility's normal working force.

The question of the financial feasibility of installing not less than 400 meters per month on the Dyke system, in addition to metering all new service connections, is somewhat more complex. It may be noted that the Supreme Court of California found nothing unreasonable in the Commission's order. (*Dyke Water Co. v. P.U.C.*, supra.) In fact, the Court observed that, in a prior decision involving the utility's request for authority to serve in an extensive area in Orange County (Decision No. 53858, dated October 1, 1956, in Applications Nos. 37097 and 37061, 55 Cal. P.U.C. 235, petitions for review denied by Supreme Court of California, without opinion, on August 27, 1957, S.F. 19657-19660), the utility's own witnesses, including Dyke Lansdale, its then president, testified that metering the system was "essential" and that numerous metering companies would compete for the opportunity to do the work of installation on favorable credit terms. The Court also pointed out that when the Commission issued its order on March 22, 1960 (Decision No. 59828), directing the utility to install not less than 400 meters per month, the company had had three and a half years since the issuance of the Commission's prior order on October 1, 1956 (Decision No. 53858) within which to formulate a plan of

its own. The Court concluded: "At this late date petitioner is hardly in a position to complain that the commission's order of March 22, 1960, is impossible or unreasonable." (*Dyke Water Co. v. P.U.C.*, supra, at 120, 121.) The record shows, further, that Dyke Water Company, after Decision No. 59828 became effective July 25, 1961, never sought from the Commission any relaxation of the requirement to install not less than 400 meters per month.

The record in the basic proceeding (included in the contempt case) makes abundantly clear the imperative necessity for metering the Dyke system in order to conserve use of water and thereby contribute to the objectives of the ground water recharge program of Orange County Water District. In the present contempt proceeding, the evidence shows that, at least since 1954, respondents have considered the possibilities of metering their system and have negotiated from time to time with meter manufacturers, lending institutions and underwriters; that when the company did replace flat rate service with metered service, from time to time, its affected revenues increased; and that at least four engineering reports between 1955 and 1963 confirmed that a metering program both was economically feasible and would produce highly advantageous operating results for the company. The utility's current president, William M. Lansdale, admitted that a metering program would be beneficial, stating: "We would be crazy not to put them on for purely income purposes, extra income purposes if we had the ability to do it." (R.T. p. 1019.)

Respondents admittedly did not comply with the Commission's order to meter their system, and there is nothing in this record to show that they even complied with the order to install meters in existing services. Despite respondents' professed interest in such a program and the recitals of their efforts to secure the necessary financing, the record shows that Dyke Water Company, under the presidency of respondent Dyke Lansdale, from the time of its inception, March 5, 1951, until October 31, 1957, and again for a period of about eight months commencing in February 1959, vigorously opposed metering its system in order to enlarge and protect its water service operations in the face of competition by other water companies in Orange County during a period of unprecedented subdivision development commencing in the early 1950's. The failure to institute a metering program continued in the face of the Commission's specific orders of October 1, 1956 and March 22, 1960, and despite the Commission's finding, in Decision No. 59828, that the company would earn a rate of return of more than 7% with a properly metered system.

The evidence shows, unquestionably, that the management of Dyke Water Company not only had a fixed determination not to meter the system as ordered by the Commission but also a concrete and large-scale program to discredit and subvert the very idea of metering. The record leaves little doubt as to the effectiveness of that program in the minds of the utility's thousands of actual and potential flat rate

customers, whose natural enthusiasm for the cheaper flat rates coincide perfectly with the utility's efforts to retain them. Dyke Lansdale did not testify in the contempt hearings. Since his earlier testimony, in the basic proceeding, would have been incompatible with the professed willingness of William Lansdale to meter the system if the utility were financially able to do so, his absence is understandable.

Direct testimony concerning the company's financial situation came chiefly from Arlyne Lansdale, its secretary-treasurer. It consisted, in large part, of (a) a statement that the company was financially unable to comply with the Commission's order; (b) a description of various isolated financial obligations of the utility, uncorrelated with its other liabilities and assets; (c) statements, purportedly from Mrs. Lansdale's memory, of gross revenues, operating expenses, depreciation, and net income figures and amounts of money refunded on advances for construction, for various years; (d) a reading into the record by the witness of various data selected from the utility's annual reports, purportedly to show deficient earnings from the company's operations. None of this evidence was accompanied by an offer to make available for inspection the underlying books and records, including supporting vouchers, of Dyke Water Company. In fact, the production of records to substantiate the testimony of Arlyne Lansdale and of William M. Lansdale, by means of which that evidence might have been tested on cross-examination, was strenuously resisted by respondents and their counsel. The withholding,

by respondents, of such records renders their testimony of negligible probative value upon the question of the financial condition of the company during the time it was required to comply with the Commission's metering order in Decision No. 59828.

Affiant's rebuttal evidence presents a quite different picture of the utility's financial condition from 1956 to 1962. It shows that, if the company's management had been willing, sufficient funds could have been found to carry out an initial metering program suggested by Walter O. Weight, Pacific Coast Manager of Hersey Products Division of Hersey-Sparling Meter Company, a witness who had been called on behalf of Dyke Water Company. This witness testified that the net cost of installing meters on the Dyke system would run between $44 and $46 per service and that his company had offered to respondents a way to make a start with 500 meters to be financed by Hersey-Sparling Meter Company.

In addition to the reports, mentioned hereinabove, showing the desirability and economic feasibility of a metering program and to the fact that a substantial start could have been made, without any initial capital outlay by the utility, by acceptance of the Hersey-Sparling Meter Company's offer of financial aid, the evidence adduced in rebuttal by affiant reveals that the utility had funds avaliable to carry out the program.

The Commission found that the utility's operations would produce a rate of return of more than 7% "for a properly metered system". (Decision No. 59828.)

By July 25, 1961, however, when the metering order finally became effective after review by the Supreme Court of California, the record (including annual reports filed by the utility with the Commission and the records of certain financial transactions among members of the Lansdale family and with nonutility companies associated with Dyke Water Company) shows that substantial sums of money which otherwise could have been used for capital outlays, such as a metering program, had been diverted to other purposes. This reveals that the utility's charges to operating expenses, especially to administrative and general salaries and total administrative and general expense during the period 1958-1962, were unreasonably high; that certain accounts (Account 223, Payables to Associated Companies; Account 126, Receivables from Associated Companies) contain numerous entries indicating cash transactions with either members of the Lansdale family or associated companies; and, on the basis of account balances at December 31, 1957 and December 31, 1961, that during the period between those dates approximately $612,000 of assets of Dyke Water Company were depleted by withdrawals in the form of cash or other assets by associated companies. ("Associated companies" is defined in the Commission's Uniform System of Accounts for Water Companies.)

An analysis of the utility's "cash flow" (essential net income increased by noncash expenses such as depreciation) for the years 1956 through 1961 shows cash generated by the utility from operations during the three-year period 1959-1961 amounting to $794,798

and that the charges to the account for advances for construction, for refunds for the same period, were $701,911. A staff expert testified that "during this same period the largest demand for funds in the company was for refunds on advance contracts, since expenditures for utility plant construction were rather nominal during this same period."

Finally, the record reveals that Dyke Water Company, sometime prior to June 1, 1961, received from Farmers & Merchants Bank of Long Beach, one million dollars as the proceeds of certain promissory notes executed by the utility ($650,000, July 24, 1959) and by Dyman Corporation, its nonutility associate ($350,000, July 27, 1960) for various purposes, including "paybacks" of advance contracts and retirement of Dyke Water Company's notes held by Farmers & Merchants Bank at Garden Grove and Long Beach.

Affiant argues, from the foregoing evidence, that respondents had no real intention to comply with the Commission's metering order and that, in addition to the $1,000,000 proceeds of the loan from Farmers & Merchants Bank, internally generated cash was also available for metering, had respondents seen fit to use it for that purpose. This cash, it is urged, was available even after diverting cash to associated companies, to the payment of unreasonably high salaries to members of the Lansdale family, and to the payments of money on the obligation of another corporation and on void obligations.

Respondents' plea of financial inability to comply with the Commission's "money" orders utilizes a mis-

leading selection of isolated operating results data, combined with a bitter attack on the integrity and professional ability of the witness Knaggs, a Commission staff engineer. For example, respondents introduced certain figures in a staff "Results of Operation" study of Dyke Water Company for 1953, 1954 and 1955 (a period remote from that in which they were required to comply with the various orders here involved) in an effort to prove the company's financial plight. They urged that the study for those years "shows by the Commission staff's own figures, that the Dyke Water Company operated at a net loss of $7,985.16 in 1953, at a net loss of $7,561.19 in 1954, and at a net loss of $14,601.38 in the twelve months ending August 31, 1955". The fact is, however, that these were "recorded" figures, as the exhibit (Exhibit C-17) shows. The exhibit, on its face, contains a warning that the company's books and records do not conform to the uniform system of accounts for water corporations prescribed by the Commission and that the accounting used by the company does not adequately set out the facts concerning the company's financing and operations. Furthermore, the record shows that the alleged net losses for 1954 and for the 12 months ending August 31, 1955 were greatly exceeded by depreciation expense charged in those periods, so that operations were in fact producing cash flow despite recorded net losses.

Respondents have asserted that there should be added to the alleged deficit of $828,380 the sum of $479,182 (representing claimed Lansdale family con-

tributions, properties classified as nonoperative and a tract "seized" by the City of Anaheim which was charged out of the company's books by the Commission) and the $148,828 in payback contracts held by the Lansdale family interests (Chapter 4, pages 4-9, Exhibit No. 19), "all of which represent monies expended for Dyke Water Company and its operation, whether or not the Commission staff recognizes this as a fact." There is no sound reason for subtracting the foregoing items as obligations or financial requirements in a cash flow study for the period 1956-1961. Even if $479,182 had been contributed by the Lansdale family, by its very nature as a contribution it would create no cash obligation for the utility. The contract paybacks of $148,828 appear to have been cancelled in 1957 and so have not been an obligation since that time.

Aside from what the record shows to have been a sharp rise, to unreasonably high levels after 1958, in administrative and general salaries and expense and the depletion in the utility's assets, by payments to "associated companies" amounting to $612,000, the evidence reveals that a separate but affiliated company, Dyman Corporation, obtained $250,000 in 1958 from Farmers & Merchants Bank of Long Beach upon notes made and issued by Dyke Water Company; that in 1959 the utility made and issued another note for $650,000 for a further loan from the same bank "to be used to transfer to any or all of Dyke Water Company or Dyman Corporation accounts as needed"; that the Board of Directors of Dyke Water Company

passed a resolution authorizing its president and secretary "to open a special account under the name of Dyke Lansdale and A. Lansdale in the sum of $650,000, checks for withdrawals to be signed by both Dyke Lansdale and A. Lansdale. Said $650,000 to be used to pay any and all notes outstanding against Dyke Water Company and held by Farmers & Merchants Bank of Garden Grove and Long Beach. Balance of money to be used for 'pay-back' agreements. Transfers from 'special account' to be made to any of Dyke Water Company or Dyman Corporation accounts as needed"; that later another note in the sum of $350,000 was made and issued to the same bank by Dyman Corporation, but respondents treated this as an obligation of Dyke Water Company and paid interest on it from time to time out of moneys of Dyke Water Company; that the Dyke Water Company note for $650,000 was issued for the purpose, in part, of refunding or renewing two previous promissory notes of the utility, dated June 30, 1958, for a total of $250,000, for the benefit of Dyman Corporation; and that said $650,000 note was issued more than 12 months after the date of issuance of the earlier notes, was not authorized by the Commission, and is therefore void. (Public Utilities Code Section 825; General Order No. 24.)

In other ways, too, the evidence shows that respondents made unreasonable uses of money of Dyke Water Company. Mrs. Lansdale testified that from time to time sums of money, of unspecified amounts, were paid by the water company to creditors of Dyke

Lansdale and charged to his "drawing account"; that Dyke Lansdale had his personal accounts tied up as the result of some litigation "and we had to hide any money he had, if he might have any"; and that sums of money were loaned to Dyke Lansdale and carried on the company's books as an open account for moneys that had been paid on his behalf. Also, the evidence reveals that records of the company for the year 1961 showed total charges to the account for office supplies and expenses of $42,510, a figure that compares with the sum of $12,000 estimated by the staff for this account for the year 1959 (Exhibit 19, basic proceeding, pages 9-2).

It is entirely possible that a full disclosure, from records withheld by respondents, might show an even more favorable financial condition and might reveal other practices equally irregular.

We have considered respondents' arguments concerning the company's financial condition and we find that they are not meritorious. Nor is there any merit to respondents' assertion that the company's financial condition was the result, even in part, of unreasonably low rates. The decision fixing the rates in question (Decision No. 59828) was rendered after extensive hearings in which respondents were fully heard, it was affirmed by the Supreme Court of California, and review was denied by the United States Supreme Court, as noted hereinabove. Moreover, the Commission by a later decision of which we take official notice (Decision No. 64372, dated October 9, 1962, in Applications Nos. 43668 and 43899) disposed of two ap-

plications by Dyke Water Company for authority to increase its rates. The opinion in that later decision notes that public hearings were held on the applications on four days extending from January 31 to September 18, 1962, at Los Angeles; that applicant made no showing at any of the hearings; and that applicant's attorney, on the last date mentioned, stated that applicant desired to withdraw its applications. The applications, accordingly, were denied.[3]

Respondents' attack upon the testimony and personal integrity of the witness Knaggs constitutes a transparent and unworthy effort to change the subject—to suggest that Mr. Knaggs, rather than respondents, is the transgressor in these proceedings. We are not impressed. Mr. Knaggs' record as a staff engineer is beyond reproach His testimony in this case was not extreme; on the contrary, it was forthright, reasonable and persuasive, and it was entirely consistent with the comparable testimony of other staff engineers in innumerable similar cases involving other water utilities. We expressly find that the criticism of this witness is without justification.

Third Offense

The order (Decision No. 59828) requiring respondents to report periodically to the Commission upon what they were doing about metering became effective July 25, 1961, after review by the California Supreme Court. Respondents admitted that the utility did not

[3]On February 11, 1964, Dyke Water Company filed Application No. 46191 for a systemwide increase in rates. That application has been heard and submitted for decision.

so report, but denied that the failure to do so was willful, and alleged that they were unable to comply.

The only activity called for by this order was the writing of a report every six months. Respondents' officials explained, on cross-examination, that they did not file the reports either because of their pending negotiations with the City of Garden Grove to acquire portions of the Dyke system (which later were broken off), or because William M. Lansdale considered certain conversations with Commission staff personnel at Los Angeles as the equivalent of compliance with the order.

The order to report was specific and entailed the performance of mere clerical acts. Respondents' explanations fall far short of justification for their admitted failure to comply with that order.

Fourth Offense

The order to dispose of $39,946.77 of recorded contributions in aid of construction (pp. 1-6, Exhibit E, affiant's affidavit) admittedly was not complied with. Respondents denied willfulness and alleged that compliance would have seriously jeopardized the utility's operations. The record shows affirmatively that the failure to dispose of these contributions was intentional and that such disposition would have been possible with cash available to the company, as indicated in the discussion above concerning the utility's financial condition in 1958 and after.

These contributions were exacted by the utility from various persons, prior to June 30, 1958, for

meter and service connections and main extensions under conditions found by the Commission to have been unlawful and in violation of the utility's tariffs; they were ordered to be repaid in cash to designated persons. (Decision No. 59828. See also, Decision No. 61642, dated March 13, 1961, Application No. 42454, in which Dyke Water Co. was authorized to transfer certain properties to the City of Garden Grove, subject to a condition, among others, that these contributions be repaid on or before May 1, 1961.)

Respondents' intentions concerning repayment of these contributions emerge from this record in the contradictory statements of Mrs. Lansdale and in a review of the record in the basic proceeding. The witness, when asked on direct examination why the company had not disposed of the contributions as ordered, testified that the utility did not owe some of the amounts, that some of the contributors could not be located, that others did not insist on immediate repayment, and that all this occurred at the time of the then pending sale to the City of Garden Grove when it was contemplated that a trust would be established with the Farmers & Merchants Bank to repay those who had agreed to accept the refund.

When asked on cross-examination whether the utility had ever done anything to seek review of the Commission's order pertaining to contributions (Decision No. 59828), or to have it modified, or to attack its validity or accuracy, the witness, at first, answered in the negative but later changed to an affirmative

reply. The record in the basic proceeding, however, shows that the petition for rehearing before the Commission with respect to Decision No. 59828 (filed on March 31, 1960) did not challenge the ordered disposition of these contributions, that respondents did not seek review of that particular point in the California Supreme Court, and that the Court's decision does not discuss it.

The witness then testified on cross-examination that "we had set up a trust" to repay the contributions in connection with the then contemplated sale to the City of Garden Grove, and that the utility had planned to do this even before being ordered by the Commission to do so as a condition of the transfer authorization (Decision No. 61642, supra). The transfer application, however, although making provision in the annexed contract of sale for payment of advances for construction, made no provision for repayment of the contributions as ordered by the Commission in Decision No. 59828. On the contrary, the application requested (Application No. 42454, page 8) that "All existing executory orders of this Commission applicable to Dyke Water Company shall be of no further force or effect."

On March 17, 1961, after issuance of Decision No. 61642, Dyke Water Company filed with the Commission a Declaration of Trust, executed March 16, 1961 by the utility as Trustor and Farmers & Merchants Trust Company of Long Beach as Trustee, which recited that "Trustee does hereby acknowledge the receipt from Trustor of the said sum of $39,946.77

in trust, upon the uses and trusts hereinafter more particularly described." This document was filed in compliance with ordering paragraph 4 of Decision No. 61642. Despite the foregoing recital by the Trustee, Mrs. Lansdale admitted on cross-examination that no such sum of money was in fact received by the Trustee, but only a promissory note in that amount which was later returned to Dyke Water Company when the proposed sale to the City of Garden Grove failed of consummation.

Mrs. Lansdale also testified on cross-examination that Dyke Water Company never carried the sum of $39,946.77 on its books as a liability "because we didn't owe it", and that with respect to the issuance of the note "it was our intention to straighten that out with the Commission after the sale. We were in a hurry to get the sales completed."

The evidence demonstrates a deliberately formed intention not to comply with the Commission's order when, as shown by the foregoing discussion of the utility's financial transactions during the period subsequent to 1958, it had the cash available to it to do so.

Fifth and Sixth Offenses

Respondents have admitted failure to comply with the Commission's order of May 16, 1960 (Exhibit G to affiant's affidavit) to set up a special reserve account and bank deposit (Fifth Offense) for the difference in revenues collected under an interim rate increase of 75 cents authorized by Decision No. 56003

and the rates, theretofore in effect, which were reinstated by Decision No. 59828. The order of May 16, 1960 granted a stay of Decision No. 59828 pending review; the additional provisions requiring that the special reserve account and bank deposit be established were designed to ensure that moneys representing incremental charges thereafter collected by the company under the interim rate order (amounting ultimately to more than $250,000) be refunded in the event Decision No. 59828 were affirmed, which it was.

Respondents have also admitted failure to comply with a distinct but related order (Order Terminating Stay of Decision No. 59828, dated July 25, 1961, Ex. H to affiant's affidavit) which required the utility to formulate and advise the Commission, within 10 days from the date of the order, of a plan to refund the 75-cent difference between the interim rates and those reinstated by Decision No. 59828 (Sixth Offense).

Respondents have alleged that their noncompliance with these orders was not willful and that they were unable to comply.

The record shows that the utility was receiving the 75 cents per month increase during the interim but that the board of directors elected to use the money for other purposes rather than to set up the special account. Furthermore, when asked why the 75-cent increase was not deposited in a trust fund, Arlyne Lansdale answered: "Because we did not owe it . . . we had a stay order . . . so we did nothing."

The record reveals further evidence indicating respondents' intentions with respect to this order. De-

cision No. 61642 had required that the Supreme Court proceeding (review of Decision No. 59828—S.F. No. 20479) be dismissed and that the refunds be made on or before May 1, 1961, or, in the alternative, that a trust fund be established and sufficient moneys be deposited therein to pay all refunds on or before May 1, 1961. On March 17, 1961, the utility filed a document with the Commission (Exhibit C-8), entitled "Dyke Water Company—Reserve and Adjustment Account—Special Trust Fund—Declaration of Trust", executed March 16, 1961, naming Farmers & Merchants Trust Company of Long Beach as trustee, which recites:

> "Trustor does hereby deliver to Trustee in trust upon and subject to the uses and trusts hereinafter more particularly described the sum of $208,800.00 and Trustee does hereby acknowledge receipt thereof."

In fact, however, as Mrs. Lansdale admitted, the trustee did not receive that sum but instead received from Dyke Water Company a promissory note for $208,800 which was later returned to the company when the sale to the City of Garden Grove collapsed.

Exhibit C-10 is a copy of Application No. 43899 filed by Dyke Water Company on November 6, 1961, seeking authority to increase rates. Reference is made, on page 3 of that application, to the company's lack of funds to comply with the Commission's decisions, including "the ordered $250,000 refund." (This was one of the applications that was denied, after hearing, for failure of applicant to proceed.

Decision No. 64372.) On cross-examination, however, Mrs. Lansdale admitted that the company had never recorded the interim rate refund obligation as either a fixed or contingent liability on its books, and that she had told the company's accountant that the liability was a nominal one.

This record clearly shows that respondents did not recognize and did not intend to discharge their obligation to make provision for the required interim rate refunds to their customers.[4]

A natural consequence of respondents' denial of any obligation to make refunds was their failure to formulate any plan for that purpose and to advise the Commission thereof.

Respondents' attack upon the legality of the order of May 16, 1960 (directing the establishment of a special trust account) is without merit. After the Commission on May 9, 1960 denied the petition for rehearing of Decision No. 59828, the company's only authority for continuing to charge the higher interim rates was that very same order of May 16, 1960. Respondents may not have it both ways. Moreover, no such criticism of the order was made during the

[4]The Commission, in its decision authorizing Dyke Water Company to transfer, conditionally, a portion of its system to the City of Anaheim, ordered that an Interim Rate Trust be set up and that the trust moneys be disbursed only with the written consent of the Commission. (Decision No. 65860, August 6, 1963, Case No. 7586, as supplemented by Decision No. 65929, August 27, 1963.) The company has sought to recapture these moneys, amounting to $266,342, in an action for declaratory relief filed December 9, 1963 in the Superior Court for Sacramento County, No. 147884.

pendency of respondents' petition for review of Decision No. 59828—when respondents were collecting *and spending* the money which had been directed to be held on special deposit. Neither this Commission nor the California Supreme Court were then advised of any claimed defect in the order. Even when Decision No. 59828 was affirmed by the Supreme Court, and the Commission, on July 25, 1961, directed the company to submit a refund plan, respondents raised no such defense. No petition for rehearing of either the order of May 16, 1960 or the order of July 25, 1961 has ever been filed.

The alleged financial inability to make the refunds is irrelevant. The real violation was in spending this money in the first place. The funds were ordered to be deposited in a special *trust* account; respondents had no right to use them for any other purpose—even if they intended to make refunds at a later time. There is no claim, nor could there be, that respondents were financially unable to make the trust deposits as they collected the additional 75¢ from each customer each month. They had the money then and they clearly could have obeyed the order then. Later financial inability to restore such trust funds is no more a defense than is later inability to restore stolen property a defense to a charge of larceny.

Of course, subsequent restoration of these funds might bear upon the seriousness of respondents' conduct and the penalty to be imposed. To this extent, financial inability, if coupled with a showing of good faith effort and willingness to make restoration,

might merit consideration. However, as we have pointed out in connection with the metering requirements, respondents' alleged financial inability is not borne out on this record.

Even if financial inability were proved, it could in no way excuse the entire failure of respondents to present a refund plan pursuant to the order of July 25, 1961. At the very least, respondents were obliged to advise the Commission of their financial condition and to attempt to formulate some means of eventual restoration of the funds in question. Instead, for an extended period respondents refused even to permit reasonable inspection of the company's books.

General Discussion

If this proceeding were the outgrowth of but a single act of defiance of the Commission's proper authority, it might be hoped that a warning or admonition to respondents would be sufficient to restore a normal atmosphere of regulatory relationships. The record, however, presents a dismal story of studied and evasive tactics by respondents covering many years of rendering a public utility water service in Orange County. Although the company's service, at least from the standpoint of consumers, seems to meet expected standards of adequacy, proper regulation entails much more than consumers' approval of service. It involves the fixing of rates, the establishment of standards of plant construction, the regulation of accounting and financial matters and a host of other phases of utility activity.

Dyke Water Company and its associate, Dyman Corporation, are closely held family enterprises. As a regulatory agency of the State, we look to the utility operation and its management to provide adequate service at reasonable rates with the property the utility devotes to public use. In our regulatory function we provide the owners of such property with an opportunity to realize a reasonable return on their investment. To that end, the Commission prescribes uniform systems of accounts for water and other utilities, so that transactions related to the fixing of rates, to financing activities, to size and description of utility plant and to many other matters are available at all reasonable times, but especially during formal proceedings involving such matters. Much of the record in this case deals with unsuccessful effort by the Commission and its staff to see and audit the utility's records supporting or negating assertions by its management concerning its financial condition at specific times.

Respondents should be punished for what this record demonstrates to be their willful and contumacious defiance of this Commission's orders. For each of the offenses except the second and the fifth, we have determined that the maximum fine of $500 for each respondent is appropriate. The second and fifth offenses are more serious.

The metering requirement imposed by Decision No. 59828 was, and is, of great importance to the water supply and conservation programs of all of Orange County. Moreover, the rates ultimately authorized by

Decision No. 59828 (although lower than the interim rates) presupposed the installation of the required meters; even after allowing for investment in meters, the Commission found that a rate of return of more than 7% would result. The refusal—and, more important, the continuing refusal—of respondents to carry out a reasonable metering program is contrary to the public interest.

Although the evidence indicates that respondents may no longer be in a position to install meters at the rate of 400 per month, it was shown in some detail at the hearings that a program of 100 meters per month is feasible. If respondents are not now willing to install 100 meters per month, in addition to metering new service connections, then a fine for violating the metering requirement of Decision No. 59828 is not enough. In addition to fines for the Second Offense, therefore, our order in this proceeding will provide for five days of imprisonment for each of the individual respondents unless 1,000 meters are installed in the next ten months, at the rate of 100 per month, in addition to the metering of all new service connections.

The Fifth Offense likewise involves serious misconduct. If this trust money is not refunded, then respondents belong in jail.

In Case No. 7586 (involving the recent transfer of approximately one-third of the Dyke Water Company system to the City of Anaheim), the company agreed to a Commission requirement calling for the creation of a trust fund for such refunds in the amount of

approximately $266,000. That trust has been established, with a bank as trustee, and it is subject to a provision that no disbursement may be made except with the approval of this Commission. The company, however, has since filed an action in the Superior Court for Sacramento County (No. 147884) in which it seeks to regain these funds. The Superior Court suit is frivolous, and we entertain no doubt that it will be dismissed in accordance with the rule recently reaffirmed by the California Supreme Court in the Sokol case. (*Pac. Tel. & Tel. Co. v. Superior Court,* 60 Adv. Cal. 383.) Meanwhile, further unjustified delay results.

Our order herein, in addition to maximum fines for the Fifth Offense, will provide for imprisonment of the individual respondents unless they promptly carry out a satisfactory refund program.

FINDINGS OF FACT

First Offense

1. On November 28, 1962, the affidavit of Rolla J. Weiser for an order to show cause herein was filed with the Public Utilities Commission of the State of California, in which it was alleged, in substance, that respondents, notwithstanding the Commission's order in Decision No. 59828 and its further orders of May 16, 1960 and July 25, 1961, all issued in the above-entitled consolidated proceedings, and with knowledge of the contents of said orders, with ability to comply therewith and with intent to violate said orders and during their effective period, failed and refused to comply therewith.

2. On November 28, 1962, subsequent to said filing of said affidavit, the Commission duly issued its order directing respondents, and each of them, to appear before Commissioner George C. Grover and such Examiner as might thereafter be designated, at 10 o'clock a.m. on the 9th day of January 1963, in the Commission Courtroom, State Building, 107 South Broadway, Los Angeles, California, there to show cause why said respondents should not be punished for the alleged contempts set forth in said affidavit. A certified copy of said order to show cause, to which was attached a certified copy of said affidavit, was personally served on respondents Arlyne Lansdale and Dyke Water Company, a corporation, on November 30, 1962, on respondent Dyke Lansdale on December 3, 1962 and on respondent William M. Lansdale on December 17, 1962. On January 9, 1963 and each of the days thereafter to which the hearings herein were duly and regularly adjourned, each of said respondents appeared, in person or by counsel, and participated fully herein.

3. On December 17, 1957 the Commission, by its Decision No. 56003 duly given and made, authorized respondent Dyke Water Company, a regulated public utility water corporation, to file certain schedules of rates for water service as shown in Appendix A attached to said decision and to make said rates effective for service rendered on and after January 1, 1958. Thereafter, said respondent filed such rates with the Commission on December 27, 1957 and such rates thereupon became the lawfully established rates of

said respondent for public utility water service rendered by it on and after January 1, 1958. Said respondent from time to time assessed and collected from its customers, for such service, charges calculated by the use of such rates.

4. On March 22, 1960, the Commission duly issued in the above-entitled consolidated proceedings Decision No. 59828, in which it ordered that:

(a) The rates and charges established by Decision No. 56003 be terminated as of the seventh day following the effective date of said order.

(b) Coincidental with the termination of said rates and charges there be reinstated, as the regularly filed and effective rates of Dyke Water Company, Tariff Schedule No. 1, General Metered Service, Cal. P.U.C. Sheet No. 69-W, and Tariff Schedule No. 2, General Flat Rate Service, Cal. P.U.C. Sheets Nos. 116-W and 117-W.

(c) Dyke Water Company adjust its books of account to conform to a certain balance sheet, prepared by the Commission staff, as of December 31, 1957, after adjustments, as shown on Table 4-B of Exhibit 19 in said consolidated proceedings.

(d) Dyke Water Company immediately institute a metering program and install, so as to permanently convert from flat rate to metered service, not less than 400 meters per month, in addition to metering all new service connections, until all residential and general service connections should have been metered; and, within ninety days after the effective date of said order and every 180 days thereafter, report to the Com-

mission in writing the total number of meters installed, together with the net number of meters installed during the period covered in each such report, until all of its service connections should have been metered.

(e) Dyke Water Company immediately dispose of its recorded contributions pursuant to the classification and itemization in Appendix C of Exhibit 44 in said consolidated proceedings, in accordance with the staff recommendations contained in Chapter 4 of said exhibit; and, within ninety days after the effective date of said order, certify to the Commission in writing, over the signature of a responsible officer, that it had complied therewith.

5. A certified copy of said Decision No. 59828 was duly served on March 22, 1960 upon Dyke Lansdale, then President of Dyke Water Company, and upon each of the then attorneys of record of said corporation in the above-entitled proceedings. Respondent Dyke Water Company and its officers and directors had notice and knowledge of the issuance of said Decision No. 59828 and of the contents thereof. On March 22, 1960, respondent William M. Lansdale was an officer of Dyke Water Company and respondent Arlyne Lansdale was its Secretary-Treasurer and Attorney and an officer thereof.

6. On May 16, 1960 the Public Utilities Commission of the State of California duly issued in said consolidated proceedings an order that:

a. The effective date of Decision No. 59828 be stayed pending a review proceeding thereon

by the Supreme Court of the State of California and until the final determination of said proceeding or until further order of the Commission.

b. Dyke Water Company forthwith set up and maintain a special reserve account and bank account and credit thereto from time to time amounts representing the difference between revenues accruing on and after the effective date of said order under rates authorized by Interim Decision No. 56003, dated December 17, 1957, and those accruing under rates authorized by Decision No. 59828, dated March 22, 1960, the effective date of which was stayed as hereinabove described.

c. Dyke Water Company designate, as special trustee, a bank authorized to do business in the State of California and open a special trust account and maintain on deposit therein a sum of money equal to the balance in the special reserve account created by said order of May 16, 1960.

Said order of May 16, 1960 became effective on the date thereof.

7. A certified copy of said order of May 16, 1960 was duly mailed by first class mail on May 16, 1960 to the same persons as those identified hereinabove in paragraph 5 of these findings as persons upon whom a certified copy of said Decision No. 59828 was served. On May 16, 1960 said Dyke Lansdale was President of said Dyke Water Company. Respondent Dyke Water Company and its officers and directors had notice and knowledge of the issuance of said order of May 16, 1960 and of the contents thereof. On May

16, 1960, respondent William M. Lansdale was an officer of Dyke Water Company and respondent Arlyne Lansdale was its Secretary-Treasurer and Attorney and an officer thereof. On June 22, 1961, the Supreme Court of California affirmed said Decision No. 59828.

8. On July 25, 1961, the Public Utilities Commission of the State of California duly issued in said consolidated proceedings an order that:

a. Decision No. 59828 in its entirety be made effective as of the date of said order of July 25, 1961.

b. Within ten days from the date of said order of July 25, 1961 Dyke Water Company formulate and advise the Commission of a plan to refund to its consumers moneys collected by it representing the difference between revenues accruing on and after May 16, 1960, under rates authorized by Decision No. 56003 and those which would have accrued under rates authorized by Decision No. 59828.

9. A certified copy of said order of July 25, 1961 was mailed by first class mail on July 26, 1961 to William M. Lansdale, President, Dyke Water Company, and to Richard P. Roe, H. O. Van Petten and Frederick L. Simmons, Attorneys, 433 South Spring Street, Room 633, Los Angeles 12, California. On July 26, 1961, said William M. Lansdale was President of Dyke Water Company and said Richard P. Roe, H. O. Van Petten and Frederick L. Simmons continued to be attorneys for Dyke Water Company. Dyke Water Company and its directors and officers

had notice and knowledge of the issuance of said order of July 25, 1961, and of the contents thereof. On July 26, 1961, said Dyke Lansdale was Vice President of said Dyke Water Company and an officer thereof, and said Arlyne Lansdale was its Secretary-Treasurer and Attorney and an officer thereof.

10. On March 20, 1962, a stipulation was entered into by and between said Dyke Water Company, by William M. Lansdale as its President and Roe and Rellas (by Chris S. Rellas) as its then attorneys of record in these consolidated proceedings, and J. Thomason Phelps, attorney for the staff of the Commission.

11. Paragraph 1 of said stipulation is as follows:

> "1. That as of the date hereof, the Dyke Water Company has not adjusted its books of account to conform to the balance sheet as of December 31, 1957, after adjustments, as shown on Table 4-B of Exhibit 19, as directed by ordering paragraph 3 of Decision No. 59828."

The facts recited in said paragraph 1 of said stipulation are true.

12. Dyke Water Company, and William M. Lansdale, Arlyne Lansdale and Dyke Lansdale, and each of them, while officers and directors of said company and while having notice and knowledge of the contents of said Decision No. 59828, including ordering paragraph 3 thereof, and while having ability to comply with said ordering paragraph 3, and while said Decision No. 59828 and paragraph 3 thereof remained in force and effect, failed, within a reasonable time

after the effective date of said decision, and with intent to violate the same, to comply with said ordering paragraph 3, in that they failed and refused to adjust or cause to be adjusted the books of account of said Dyke Water Company to conform to the balance sheet as of December 31, 1957, after adjustments, as shown on said Table 4-B of said Exhibit 19. Said failure and refusal were in violation of law and in contempt of the Commission and of its said order.

Second Offense

13. We refer to and incorporate by this reference paragraphs 1 through 10, inclusive, of the findings hereinabove set forth with respect to the First Offense, with the same force and effect as if said paragraphs and each and every finding therein were set forth in full herein.

14. Paragraph 3 of said stipulation of March 20, 1962 is as follows:

> "3. That the Dyke Water Company has not as of the date hereof instituted a metering program in addition to metering new service connections, as directed by ordering paragraph 4 of Decision No. 59828."

The facts recited in said paragraph 3 of said stipulation are true.

15. Dyke Water Company, and William M. Lansdale, Arlyne Lansdale and Dyke Lansdale, and each of them, while officers and directors of said company and while having notice and knowledge of the contents of said Decision No. 59828, including ordering para-

graph 4b. thereof, and while having ability to comply with said ordering paragraph 4b., and while said Decision No. 59828 and said ordering paragraph 4b. remained in force and effect, have continuously, since the issuance of said decision to the present time, and with intent to violate the same, failed and refused to comply with said ordering paragraph 4b., in that they have failed and refused to institute a metering program, and to install or cause to be installed not less than 400 meters per month in addition to metering all new service connections, until all residential and other general service connections should have been metered. Said failure and refusal were in violation of law and in contempt of the Commission and of its said order. Respondents presently have the ability to install such meters at the rate of 100 per month in addition to metering all new service connections.

Third Offense

16. We refer to and incorporate by this reference paragraphs 1 through 10, inclusive, of the findings hereinabove set forth with respect to the First Offense with the same force and effect as if said paragraphs, and each and every finding therein, were set forth in full herein.

17. Dyke Water Company, and William M. Lansdale, Arlyne Lansdale and Dyke Lansdale, and each of them, while officers and directors of said company, and while having notice and knowledge of the contents of said Decision No. 59828, including ordering paragraph 4c. thereof, and while having ability to comply with said ordering paragraph 4c., and while said De-

cision No. 59828 and said ordering paragraph 4c. remained in force and effect, have continuously, since the issuance of said decision to the present time, and with intent to violate the same, failed and refused to comply with said ordering paragraph 4c., in that they have failed and refused to report or cause to be reported to said Commission in writing, within 90 days after the effective date of said Decision No. 59828, and every 180 days thereafter, the total number of meters installed by said Dyke Water Company, together with the net number of meters installed by it during the period covered in each such report, until all of its general service connections should have been metered. Said failure and refusal were, and continue to be, in violation of law and in contempt of the Commission and of its said order.

Fourth Offense

18. We refer to and incorporate by this reference paragraphs 1 through 10, inclusive, of the findings hereinabove set forth with respect to the First Offense with the same force and effect as if said paragraphs, and each and every finding therein, were set forth in full herein.

19. Paragraph 5 of said stipulation of March 20, 1962 is as follows:

> "5. That the Dyke Water Company has not disposed of all of recorded contributions pursuant to the classification and itemization in Appendix C of Exhibit No. 44 in accordance with the staff recommendations contained in Chapter 4 of said Exhibit, as directed by ordering paragraph 6 of Decision No. 59828."

The facts recited in said paragraph 5 of said stipulation are true.

20. Dyke Water Company, and William M. Lansdale, Arlyne Lansdale and Dyke Lansdale, and each of them, while officers and directors of said company, and while having notice and knowledge of the contents of said Decision No. 59828, including ordering paragraph 6a. thereof, and while having ability to comply with said ordering paragraph 6a., and while said Decision No. 59828 and said ordering paragraph 6a. remained in force and effect, have continuously, since the issuance of said decision to the present time, and with intent to violate the same, failed and refused to dispose of or cause to be disposed of the contributions recorded by said Dyke Water Company pursuant to the classification and itemization in Appendix C of Exhibit No. 44 in accordance with the staff recommendations contained in Chapter 4 of said exhibit, in that they have failed and refused to return, or cause to be returned, to the persons and in the amounts shown on pages 1-6, inclusive, of said Appendix C, such contributions. Said failure and refusal were, and continue to be, in violation of law and in contempt of the Commission and of its said order.

Fifth Offense

21. We refer to and incorporate by reference paragraphs 1 through 10, inclusive, of the findings hereinabove set forth with respect to the First Offense with the same force and effect as if said paragraphs, and each and every finding therein, were set forth in full herein.

22. Paragraphs 7 and 8 of said stipulation of March 20, 1962, are as follows:

> "7. That the Dyke Water Company has not maintained a special reserve account entitled 'Reserve and Revenue Adjustment,' nor credited thereto an amount representing the difference between revenues accruing on and after May 16, 1960, under rates authorized by Interim Decision No. 56003, and those accruing under rates authorized by Decision No. 59828.
>
> "8. That the Dyke Water Company has not maintained on deposit in a special trust account or in any other account in a bank authorized to do business in California or in any other bank or depository a sum of money equal to the balance in the account referred to in paragraph 7 of this stipulation, or any sum of money equal to any part thereof."

The facts recited in said paragraphs 7 and 8 of said stipulation are true.

23. Dyke Water Company, and William M. Lansdale, Arlyne Lansdale and Dyke Lansdale, and each of them, while officers and directors of said company, and while having notice and knowledge of the contents of the order issued by the Commission on May 16, 1960 (hereinabove referred to in paragraph 6 of the findings herein with respect to the First Offense), and while having ability to comply therewith, and while said order remained in force and effect, have continuously, since the issuance of said order to the present time, and with intent to violate the same, failed and refused to comply therewith, in that they

have failed and refused to set up and maintain or cause to be set up and maintained a special reserve account entitled "Reserve and Revenue Adjustment" and have failed and refused to credit or cause to be credited to such an account from time to time any amount representing the difference (or any part thereof) between revenues accruing on and after the effective date of said order of May 16, 1960 under rates authorized by said Decision No. 56003 (referred to in paragraph 3 of the findings herein with respect to the First Offense) and revenues accruing under rates authorized by said Decision No. 59828 (referred to in paragraph 4 of the findings herein with respect to the First Offense), and in that (except as specified hereafter in this paragraph 23) they have failed and refused to designate or cause to be designated as special trustee a bank authorized to do business in the State of California, or to open or cause to be opened in such bank or any other bank or depository a special trust account or to maintain or cause to be maintained on deposit in such account a sum of money equal to the balance in any such special reserve account, said exception being that, purusant to the Commission's Decision No. 65860, dated August 6, 1963, in Case No. 7586, and decisions supplemental thereto (which conditionally authorized Dyke Water Company to transfer a portion of its assets to the City of Anaheim), Dyke Water Company did establish an Interim Rate Trust with Farmers & Merchants Bank of Long Beach, containing a corpus of $266,342 which may be disbursed only with the written

approval of the Commission. Dyke Water Company has sought to recapture said $266,342 by an action in the Superior Court of the State of California, in and for the County of Sacramento, No. 147884. Said failure and refusal were, and continue to be, in violation of law and in contempt of the Commission and of its said order of May 16, 1960.

Sixth Offense

24. We refer to and incorporate by reference paragraphs 1 through 10, inclusive, of the findings hereinabove set forth with respect to the First Offense with the same force and effect as if said paragraphs, and each and every finding therein, were set forth in full herein.

25. Paragraph 9 of said stipulation of March 20, 1960, is as follows:

> "9. That the Dyke Water Company did not, within ten days from the date of the order of July 25, 1961 (Order Terminating Stay of Decision No. 59828) formulate and advise the Commission of a plan whereby it will refund to its customers moneys collected by it representing the difference between revenues accruing on and after May 16, 1960, under rates authorized by Interim Decision No. 56003 and those that would have accrued under rates authorized by Decision No. 59828; and further, that Dyke Water Company has not, as of the date hereof, formulated and advised the Commission of any such plan."

The facts recited in said paragraph 9 of said stipulation are true.

26. Dyke Water Company, and William M. Lansdale, Arlyne Lansdale and Dyke Lansdale, and each of them, while officers and directors of said company, and while having notice and knowledge of the contents of said Order Terminating Stay of Decision No. 59828, issued by said Commission on July 25, 1961, as aforesaid, and while having ability to comply therewith, and while said order remained in force and effect, and with intent to violate the same, have failed and refused to formulate or cause to be formulated or to advise the Commission, or cause the Commission to be advised, of a plan whereby said Dyke Water Company would refund to its customers moneys collected by it representing the difference between revenues accruing on and after May 16, 1960 under rates authorized by Decision No. 56003 and revenues that would have accrued under rates authorized by Decision No. 59828. Said failure and refusal were, and continue to be, in violation of law and in contempt of the Commission and of its said order of July 25, 1961.

27. For said contempts, respondents should be punished as provided in the following judgment and order.

JUDGMENT AND ORDER

Dyke Water Company, a corporation, and William M. Lansdale, Arlyne Lansdale and Dyke Lansdale, having appeared in person or by counsel and having been given full opportunity to answer the order to show cause herein, dated November 28, 1962, and

to exonerate themselves from the alleged contempts set forth in the affidavit filed herein on November 28, 1962; now, therefore, based upon the foregoing Opinion and Findings of Fact,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. Dyke Water Company, a corporation, and William M. Lansdale, Arlyne Lansdale and Dyke Lansdale, as officers and directors of said corporation, are and each of them is guilty of contempt of the Public Utilities Commission of the State of California in disobeying its order made March 22, 1960 in ordering paragraph 3 of its Decision No. 59828 in the consolidated proceedings herein, Application No. 39303 and Case No. 5841, by failing and refusing to make or cause to be made, within a reasonable time, adjustments to the books of account of said corporation as directed by said order. (First Offense.)

2. Dyke Water Company, a corporation, and William M. Lansdale, Arlyne Lansdale and Dyke Lansdale, as officers and directors of said corporation, are and each of them is guilty of contempt of the Public Utilities Commission of the State of California in disobeying its order made March 22, 1960 in ordering paragraph 4b. of its Decision No. 59828 in the consolidated proceedings herein, Application No. 39303 and Case No. 5841, by failing and refusing to institute or cause to be instituted a metering program and to install or cause to be installed meters as directed by said order. (Second Offense.)

3. Dyke Water Company, a corporation, and William M. Lansdale, Arlyne Lansdale and Dyke Lansdale, as officers and directors of said corporation, are and each of them is guilty of contempt of the Public Utilities Commission of the State of California in disobeying its order made March 22, 1960, in ordering paragraph 4c. of its Decision No. 59828 in the consolidated proceedings herein, Application No. 39303 and Case No. 5841, by failing and refusing to report, or to cause to be reported, to the Commission, in writing, within the times specified, concerning the installation of meters as directed by said order. (Third Offense.)

4. Dyke Water Company, a corporation, and William M. Lansdale, Arlyne Lansdale and Dyke Lansdale, as officers and directors of said corporation, are and each of them is guilty of contempt of the Public Utilities Commission of the State of California in disobeying its order made March 22, 1960, in ordering paragraph 6a. of its Decision No. 59828 in the consolidated proceedings herein, Application No. 39303 and Case No. 5841, by failing and refusing to dispose of recorded contributions, or to cause recorded contributions to be disposed of, as directed by said order. (Fourth Offense.)

5. Dyke Water Company, a corporation, and William M. Lansdale, Arlyne Lansdale and Dyke Lansdale, as officers and directors of said corporation, are and each of them is guilty of contempt of the Public Utilities Commission of the State of California in

disobeying its order made May 16, 1960 (Order Staying Decision No. 59828) in the consolidated proceedings herein, Application No. 39303 and Case No. 5841, by failing to set up and maintain or cause to be set up and maintained a special reserve account and by failing to maintain or cause to be maintained on deposit in a special trust account certain sums of money, as directed by said order. (Fifth Offense.)

6. Dyke Water Company, a corporation, and William M. Lansdale, Arlyne Lansdale and Dyke Lansdale, as officers and directors of said corporation, are and each of them is guilty of contempt of the Public Utilities Commission of the State of California in disobeying its order made July 25, 1961 (Order Terminating Stay of Decision No. 59828) in the consolidated proceedings herein, Application No. 39303 and Case No. 5841, by failing and refusing to formulate, or cause to be formulated, and by failing and refusing to advise the Commission of, or to cause the Commission to be advised of, a plan whereby Dyke Water Company would refund to its customers moneys collected by it representing the difference between revenues accruing on and after May 16, 1960 under rates authorized by Decision No. 56003 and revenues that would have accrued under rates authorized by Decision No. 59828, as directed by said order of July 25, 1961. (Sixth Offense.)

7. For said contempts of the Public Utilities Commission of the State of California and its orders, as hereinabove described, the following punishments are hereby imposed:

A. For each of the six contempts (First through Sixth Offenses, inclusive) specified hereinabove, Dyke Water Company shall pay a fine of $500, said fine, totalling $3,000, to be paid to the Secretary of the Public Utilities Commission of the State of California, 5th Floor, State Building, San Francisco, California, within five (5) days after the effective date of this decision.

B. For each of the six contempts (First through Sixth Offenses, inclusive) specified hereinabove, in addition to the punishment ordered in subparagraphs C and D of this paragraph 7 of this order, each of the individual respondents (William M. Lansdale, Arlyne Lansdale and Dyke Lansdale) shall pay a fine of $500, said fines, totalling $3,000 for each of said persons, to be paid to the Secretary of the Public Utilities Commission of the State of California, 5th Floor, State Building, San Francisco, California, within five (5) days after the effective date of this decision.

C. For the contempt described in paragraph 2 of this order (Second Offense), in addition to the fines imposed in subparagraph B of this paragraph 7 of this order, William M. Lansdale, Arlyne Lansdale, and Dyke Lansdale, and each of them, shall be committed, on a date to be fixed by further order of the Commission, to the County Jail of the County of Orange for five (5) consecutive days; provided that if Dyke Water

Company, in addition to metering all new service connections, installs not less than one hundred (100) meters during each calendar month for a period of ten (10) consecutive calendar months, commencing with the month of August 1964, and if satisfactory evidence of such installation is filed with the Commission on or before the fifth day following each such calendar month, then the Commission by further order will rescind the punishment imposed by this subparagraph C of this paragraph 7 of this order.

D. For the contempt described in paragraph 5 of this order (Fifth Offense), in addition to the fines imposed in subparagraph B of this paragraph 7 of this order, William M. Lansdale, Arlyne Lansdale and Dyke Lansdale, and each of them, shall be committed, on a day to be fixed by further order of the Commission, to the County Jail of the County of Orange for five (5) consecutive days; provided that if, on or before the tenth day after the effective date of this decision, respondents shall have deposited with the Secretary of the Commission the sum of $266,342 for the purpose of making the refunds contemplated by the Commission's said order of July 25, 1961, and if respondents, and each of them, on or before the tenth day after the effective date of this decision shall have filed with the Secretary of the Commission, on behalf of themselves and all persons claiming under them, a

written quitclaim and disclaimer, satisfactory to the Commission, of any and all interest in said $266,342 so deposited with the Secretary, then the Commission by further order will rescind the punishment imposed by this subparagraph D of this paragraph 7 of this order. The $266,342 now held by Farmers & Merchants Bank of Long Beach in the Interim Rate Trust (pursuant to the Commission's orders in Case No. 7586) may be used to make said deposit with the Secretary of the Commission.

8. In default of the payment, by William M. Lansdale, Arlyne Lansdale, or Dyke Lansdale, of the fines imposed upon each of said persons, as ordered in subparagraph B of paragraph 7 of this order, such person or persons so in default shall be committed to the County Jail of the County of Orange, State of California, until such fine, or fines, be paid or satisfied in the proportion of one day's imprisonment for each fifty dollars ($50) of said fine that shall be unpaid.

9. The Secretary of the Public Utilities Commission of the State of California, if said fines or any part thereof shall not be paid by any of the aforementioned natural persons within the time specified above, shall prepare and issue an appropriate order or orders of arrest and commitment in the name of the Public Utilities Commission of the State of California, directed to the Sheriff of the County of Orange, to which shall be attached and made a part thereof a certified copy of this decision.

10. As to each respondent, the terms of imprisonment imposed by subparagraphs C and D, respectively, of paragraph 7 of this order shall be served consecutively and not concurrently. Furthermore, such terms of imprisonment shall be in addition to, and shall be served consecutively with, any and all imprisonment resulting from paragraph 8 of this order.

For purposes of rehearing and judicial review as contemplated by Sections 1731 and 1767, inclusive, of the Public Utilities Code, this decision shall become effective, as to each of the contemnors hereinabove named, twenty days after personal service of a certified copy hereof upon such contemnor. In all other respects said decision shall become effective the date hereof. The Secretary is directed to make personal service of a certified copy of this decision upon each of said contemnors.

Dated at San Francisco, California, this 10th day of July, 1964.

Frederick B. Holoboff
President

Everett C. McKeage
George G. Grover
Commissioners

Certified as a True Copy
(Seal) Noël Coleman
Acting Secretary
Public Utilities Commission
State of California

Before the Public Utilities Commission
of the State of California

In the Matter of Application of Dyke Water Company, a corporation, for authorization to increase its rates charged for water service.	Application No. 39,303
Investigation on the Commission's own motion into the rates, rules, regulations, contracts, operations and practices pertaining to and involving water main extensions of Dyke Water Company, a public utility water corporation.	Case No. 5841 Order to Show Cause (Contempt)

BENNETT, William M., Commissioner, Dissenting Opinion:

The power to punish for contempt is an extraordinary one. It has been entrusted to us to use only under appropriate circumstances and then, and most importantly, with reasonable dispatch. Because of the severe penalties which the power of contempt permits, it is imperative that the Commission accord due process to the parties upon whom it is to be visited.

I have read the record herein and note that the proceeding is punctuated with delay and confusion; it is an abundance of monologue. Further, the offenses which are alleged to be contemptuous of this Commission are like grievances stored in a bank apparently to be withdrawn whenever whim permits. If Commis-

sion authority has been violated, if decisions are not respected, this Commission in the past had the absolute duty to proceed in a manner the law contemplates and with diligence. It was not done here and it was not done throughout the proceedings. The penalties imposed by way of fines and possible imprisonment are harsh and excessive.

This Commission, going back into the years, has started and stopped contempt proceedings against this respondent. It has launched charges in a whirl of energy and enthusiasm, it has energized the staff to action and then nothing has resulted. This is not a power to be lightly used. The delay attendant upon the charges herein and the sporadic manner in which they have been prosecuted compels me to the conclusion that we have erred in reaching the result herein. Accordingly, I dissent from the conclusions reached and the penalties imposed simply because past clear violations so long neglected by this Commission cannot be resurrected at will depending upon changing enthusiasm or lack thereof.

/s/ William M. Bennett
William M. Bennett
Commissioner

Dated at San Francisco, California,
July 16, 1964.

Certified as a True Copy
Noël Coleman
Acting Secretary
Public Utilities Commission
State of California
3/1/65

(Seal)

I concur in part and dissent in part.

The record is clear that the Dyke Water Company has failed to comply with the six directives of this Commission alleged in the Order to Show Cause issued November 28, 1962.

Because of the penalties which may be imposed, contempt is criminal in nature and such proceedings are construed strictly to protect the interests of the accused. Technically, therefore, I do not believe the majority decision can be supported.

Assuming that the decision were legally supportable, nonetheless it does not solve the problem of metering the Dyke water system. Indeed, the requirement in the order of 100 meters per month (for ten months only) is merely a token supplementation. If, as the decision states, the need for water conservation in Orange County is immediate, the action of this Commission to meter the entire Dyke water system should likewise be immediate.

/s/ Peter E. Mitchell
Peter E. Mitchell
Commissioner

Certified as a True Copy
(Seal) Noël Coleman
Acting Secretary
Public Utilities Commission
State of California
3/1/65

EXHIBIT NO. 2

Decision No. 67,778

Before the Public Utilities Commission of the State of California

In the Matter of Application of Dyke Water Company, a corporation, for authorization to increase its rates charged for water service.	Application No. 39,303
Investigation on the Commission's own motion into the rates, rules, regulations, contracts, operations and practices pertaining to and involving water main extensions of Dyke Water Company, a public utility water corporation.	Case No. 5841

ORDER MODIFYING DECISION NO. 67497 AND DENYING REHEARING

A petition for rehearing having been filed by Dyke Water Company, William M. Lansdale, Arlyne Lansdale and Dyke Lansdale, and the Commission being fully advised,

It Is Hereby Ordered that Paragraph 7D in the Commission's Judgment and Order in Decision No. 67497 is hereby amended to read as follows:

D. For the contempt described in paragraph 5 of this order (Fifth Offense), in addition to the fines imposed in subparagraph B of this paragraph 7 of this order, William M. Lansdale, Arlyne Lansdale and Dyke Lansdale, and each of them, shall be committed, on a day to be fixed by further order of the Commission, to the County Jail of the County of Orange for five (5) consecutive days; provided that if, on or before the 30th day of September 1964, respondents shall have deposited with the Secretary of the Commission the sum of $266,342 for the purpose of making the refunds contemplated by the Commission's said order of July 25, 1961, then the Commission by further order will rescind the punishment imposed by this subparagraph D of this paragraph 7 of this order. The $266,342 now held by Farmers & Merchants Bank of Long Beach in the Interim Rate Trust (pursuant to the Commission's orders in Case No. 7586) may be used to make said deposit with the Secretary of the Commission. Any excess thereof over the exact amount due to be refunded shall be returned to Dyke Water Company by the Secretary of the Commission.

As herein modified, rehearing of Decision No. 67497 is hereby denied.

The effective date of this decision as to each contemner shall be twenty days after personal service thereof upon each such contemner. The Assistant Secretary is directed to cause personal service hereof to be made upon each of said contemners.

Dated at San Francisco, California, this 25th day of August, 1964.

Frederick B. Holoboff
President

Everett C. McKeage
George G. Grover
Commissioners

I dissent.

/s/ Peter E. Mitchell

I would grant rehearing for the reasons previously stated in my prior dissenting opinion.

/s/ William M. Bennett

Certified as a True Copy
Noël Coleman
Acting Secretary
Public Utilities Commission
State of California

(Seal)

EXHIBIT NO. 3

S.F. No. 21828

In the Supreme Court of the State of California
In Bank

Dyke Water Company et al.
v.
Public Utilities Commission

ORDER DENYING WRIT OF REVIEW

Petition for writ of review Denied.

Mosk, J. and Schauer, J. are of the opinion that the petition should be granted.

Traynor, Chief Justice

I, William I. Sullivan, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding is a true copy of an order of this Court, as shown by the records of my office.

Witness my hand and the seal of the Court this 17th day of February, A.D. 1965.

William I. Sullivan, Clerk
By Bishel, Deputy Clerk

(Seal)

Filed Nov. 19, 1964, 10 a.m.
William I. Sullivan, Clerk
By Crabtree, S.F. Deputy

EXHIBIT NO. 4

Order Due December 18, 1964

S.F. No. 21828

In the Supreme Court of the State of California
In Bank

Dyke Water Company et al.

v.

Public Utilities Company

ORDER DENYING REHEARING

Petition for rehearing Denied.

Peters, J. and Mosk, J. are of the opinion that the petition should be granted.

Traynor, Chief Justice

I, William I. Sullivan, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding is a true copy of an order of this Court, as shown by the records of my office.

Witness my hand and the seal of the Court this 17th day of February, A.D. 1965.

William I. Sullivan, Clerk
By Bishel, Deputy Clerk

(Seal)

Filed Dec. 17, 1964.
William I. Sullivan, Clerk
By Crabtree, S.F. Deputy

EXHIBIT NO. 5

S.F. No. 21828
In the Supreme Court of the State of California
In Bank

Dyke Water Company et al.
v.
Public Utilities Commission et al.

Application for stay Denied.
Traynor, Chief Justice

I, William I. Sullivan, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding is a true copy of an order of this Court, as shown by the records of my office.

Witness my hand and the seal of the Court this 17th day of February, A.D. 1965.

William I. Sullivan, Clerk
By Bishel, Deputy Clerk

(Seal)

Filed Dec. 23, 1964.
William I. Sullivan, Clerk
By Bishel, S.F. Deputy

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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 979

DYKE WATER COMPANY, a California corporation, and WILLIAM M. LANSDALE, president, and ARLYNE LANSDALE, secretary-treasurer, officers, directors and stockholders of said DYKE WATER COMPANY, and DYKE LANSDALE,

Petitioners,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, and FREDERICK B. HOLOBOFF, GEORGE G. GROVER, EVERETT C. McKEAGE, PETER E. MITCHELL and WILLIAM M. BENNET, members of and constituting said Public Utilities Commission of the State of California,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of California

Brief in Opposition

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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 979

DYKE WATER COMPANY, a California corporation, and WILLIAM M. LANSDALE, president, and ARLYNE LANSDALE, secretary-treasurer, officers, directors and stockholders of said DYKE WATER COMPANY, and DYKE LANSDALE,

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PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, and FREDERICK B. HOLOBOFF, GEORGE G. GROVER, EVERETT C. McKEAGE, PETER E. MITCHELL and WILLIAM M. BENNET, members of and constituting said Public Utilities Commission of the State of California,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of California

Brief in Opposition

The respondents Public Utilities Commission of the State of California and the individual members thereof (hereinafter called Commission) respectfully submit that the Peti-

tion for a Writ of Certiorari of Dyke Water Company, William M. Lansdale, Arlyne Lansdale, and Dyke Lansdale should be denied.

OPINION BELOW

On November 19, 1964 the Supreme Court of California denied, without opinion, petitioners' Petition for a Writ of Review of Decision No. 67497 of the California Public Utilities Commission issued on July 10, 1964 and reported at 63 Cal. P.U.C. 76 (set out on pages 1a-55a of the Appendix to the instant Petition).

JURISDICTION

The basis of the Court's jurisdiction is set forth in the Petition.

STATEMENT OF THE CASE

Petitioners' Statement of the Case (Petition, pp. 3, 4) is inaccurate in that:

(1) The proceedings before the Commission were not "Heard by a single Commission member.", but by a Commissioner and a Legal Examiner regularly employed as a member of the Commission's staff.

(2) It is stated that the Commission adjudged petitioners guilty of contempt "upon the report and recommendation of the single Commissioner who presided," without reference to the voluminous record.

(3) No reference is made to the conditions attached to the jail sentences imposed by the Commission. (See Appendix to Petition, pp. 52a, 53a, 60a.)

QUESTION PRESENTED

Does the exercise by the Commission, in any manner whatever upon petitioners, of the contempt powers granted

to it by the laws of the State of California, deprive petitioners of rights guaranteed to them by the Constitution of the United States?

No question is presented with respect to the particular manner in which the powers of contempt were exercised in the proceeding before the Commission.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions and statutes involved are those set out on pages 7-10 of the Petition.

ARGUMENT

California Law Empowering the Commission to Punish Disobedience of Its Orders by Contempt Proceedings and the Exercise of Such Power Upon Petitioners Did Not Offend Any Provision of the Constitution of the United States.

1. Under California Law the Commission Is for Numerous Purposes a Court, Exercising Strictly Judicial Powers.

Article XII, Section 22, of the Constitution of the State of California, referring to the Public Utilities Commission, is, in material part, as follows:

> "the commission and each of the commissioners shall have the power to administer oaths, take testimony and punish for contempt in the same manner and to the same extent as courts of record;"

Sections 312 and 2113 of the Public Utilities Code of the State of California (Petition, pp. 8, 9) are legislative implementations (if such are needed) of the power granted to the Commission by the people of the State of California in adopting the constitutional provision above set out.

Other powers of a judicial nature have also been granted to the Commission by the people of the State of California.

Thus, Article XII, Section 23a, of the California Constitution, provides, in part:

> "The [Public Utilities] Commission shall have and exercise such power and jurisdiction as shall be conferred upon it by the Legislature to fix the just compensation to be paid for the taking of any property of a public utility in eminent domain proceedings by the state or any county, city and county, incorporated city or town, municipal water district, irrigation district or other public corporation or district, and the right of the Legislature to confer such powers upon the [Public Utilities] Commission is hereby declared to be plenary and to be unlimited by any provision of this Constitution."

Section 21 of said Article XII deals with rates of railroad and other transportation companies, and concludes

> "Nothing herein contained shall be construed to prevent the [Public Utilities] Commission from ordering and compelling any railroad or other transportation company to make reparation to any shipper on account of the rates charged to said shipper being excessive or discriminatory, provided no discrimination will result from such reparation."

These powers have been frequently interpreted by the Supreme Court of the State of California.

> "That judicial powers were with deliberation vested in the commission the language of the constitution and of the legislative enactments following the constitution leave no doubt. * * * The constitution has, in the [Public Utilities] commission, created both a court and an administrative tribunal." *Pacific Telephone and Telegraph Company v. Eshleman*, 166 Cal. 640, 650, 689; 137 Pac. 1119, 1122, 1138.

The Commission "is both a court and an administrative tribunal." *City of San Jose v. Railroad Commission*, 175 Cal. 284, 290; 165 Pac. 967, 969.

In a reparation case,

> "* * * before the establishment of federal and state regulatory bodies and commissions vested with powers to award reparation there was no forum except the courts wherein the right to reparation by way of damages as against alleged excessive or discriminatory rates could be adjudicated. The authority of the courts in such matters was recognized as falling within their general jurisdiction. Upon the establishment of the Commissions legislative and judicial powers were in some instances united in the same tribunal. [Citing, *Prentis et al. v. Atlantic Coast Line Railroad Company*, 211 U.S. 210; 53 L.Ed. 150.] The [Public Utilities] Commission of California is such a body." *Southern Pacific Co. v. Railroad Commission*, 194 Cal. 734, 737, 738; 231 Pac. 28, 29.

"The [Public Utilities] Commission is a body upon which has been conferred important administrative authority together with a large measure of judicial power." *The Atchison, Topeka and Santa Fe Railway Company v. Railroad Commission*, 212 Cal. 370, 374; 298 Pac. 991, 992.

In fixing the just compensation to be paid for the taking of public utility property in eminent domain the Commission exercises judicial power. *Maria Water & Power Co. v. Railroad Comm.*, 171 Cal. 706, 711; 154 Pac. 864, 866. *Southern Calif. Edison Co. v. Railroad Comm.*, 6 Cal.2d 737, 749; 59 Pac.2d 808, 813.

"The commission exercises judicial powers and its final determinations within its jurisdiction have the formality of judgments of courts of record." *People v. Lang Transportation Co.*, 217 Cal. 166, 170; 17 Pac.2d 721, 723.

In *People v. Western Airlines*, 42 Cal.2d 621, 268 Pac.2d 723, quoted, in part, on pages 11, 12 of the Petition, the Supreme Court of California, in overruling the earlier

case of *Stratton v. Railroad Commission*, 186 Cal. 119; 198 Pac. 1051, stated the following (p. 632).

> "It was also said in the Stratton case that 'the commission is essentially an administrative and legislative tribunal, and not a court,' and the fact that the commission must make determinati of fact for its own guidance 'does not make it a art or change the character of its decrees from administrative or legislative orders into judicial judgments.' These and other statements in the opinion in that case are inconsistent with the decisions of this court both before and after it on the subject of the judicial power of the commission. Insofar as they are so inconsistent they are overruled."

In view of the foregoing interpretation of California law by the highest court of that State it is a fundamental error to refer to the Commission as a mere "administrative agency."

2. Even if the Commission Were a Mere Administrative Agency, the Grant to It of Contempt Powers Does Not Transgress the Constitution of the United States.

In *Dreyer v. Illinois*, 187 U.S. 71, 84; 47 L.Ed. 79, 85, this Court said, speaking through Mr. Justice Harlan, in upholding the constitutionality of an Illinois statute granting certain judicial functions to administrative officials:

> ". . . even if the statute in question were obnoxious to the objection now urged by the plaintiff in error, [contravention of state and federal constitutions] it would not follow that this court would review a judgment of the highest court of the state, which expressly or by necessary implication sustained it as constitutional. A local statute investing a collection of persons not of the judicial department, with powers that are judicial . . . *presents no question under the Constitution of the United States.* (Emphasis added.) The right to the due process of law prescribed by the 14th amendment would not be infringed by a local statute of

> that character. Whether the legislative, executive and judicial powers of a state shall be kept altogether distinct and separate, or whether persons or collections of persons may, in respect to some matters exert powers which, strictly speaking, pertain to another department of government, is for the determination of the state. And its determination one way or the other cannot be an element in the inquiry, whether the due process of law prescribed by the 14th amendment has been respected by the state or its representatives when dealing with matters involving life and liberty."

These views indicate that in alluding to "our system of government" in *Interstate Commerce Commission v. Brimson*, 154 U.S. 447, 485; 38 L.Ed. 1047, 1060, as quoted on page 14 of the Petition, Mr. Justice Harlan was referring to the structure of the United States with its federally created administrative agencies and federal judiciary. This conclusion is reinforced by the last sentence of Mr. Justice Harlan quoted on page 14 of the Petition,

> "The power to impose fine or imprisonment in order to compel the performance of *a legal duty imposed by the United States* can only be exerted under the law of the land by a competent judicial tribunal having jurisdiction in the premises." (Emphasis added.)

In *Consolidated Rendering Company v. Vermont* (1908), 207 U.S. 541, 552; 52 L.Ed. 327, 335, this Court stated:

> "There is no provision in the Federal Constitution which directly or impliedly prohibits a state, under its own laws, from conferring upon nonjudicial bodies certain functions that may be called judicial. . . ."

This Court denied a petition for writ of certiorari in *Wycoff Co. v. Public Service Commission* (1962), 13 Utah 2d 123; 369 P.2d 283; cert. den. 371 U.S. 819; 9 L.Ed. 2d

59, where the Public Service Commission of the State of Utah had imposed upon petitioner a penalty of $18,500.00 for violations of law pursuant to a statute authorizing a penalty of not less than $500.00 nor more than $2,000.00 for each offense. The Utah Court rejected an argument similar to that of petitioner here that the penalty was criminal in nature and could be imposed only by a court.

> "The Supreme Court of the United States has never held that judicial power has been improperly vested in an agency . . ." 1 *Davis, Administrative Law,* Section 2.12, page 131.

A number of state courts, however, have upheld grants of the power to punish for contempt to administrative bodies, whether based on the state constitution, (*Ex parte Tindall,* 102 Okla. 192, 197; 229 Pac. 125; *State Ex rel Morton v. Meyers,* 171 La. 313, 131 So. 31), legislative enactment (*Plunkett v. Hamilton,* 136 Ga. 72, 77, 70 S.E. 781, 783; *In re App. of Clark,* 65 Conn. 17, 31 Atl. 522) or on the view that such power is inherent or implied. (*In re Sanford,* 236 Mo. 665, 139 S.W. 376; *In re Hayes,* 200 N.C. 133, 156 S.E. 791; *People v. Learned,* New York 5 Hun 626 [12 Sup. Ct. 3 Dept.]).

CONCLUSION

1. Under the law of California the Commission is for many purposes a court, and exercises strictly judicial powers, of which the power to punish for contempt is one.

2. Even if the Commission were a mere administrative agency, the grant to it and exercise by it of contempt powers pursuant to California law do not violate any provision of the Constitution of the United States.

The Petition should be denied.

Respectfully submitted,

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Dated: April 8, 1965